RECORDS AND BRIEFS

No. 07-1359

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JULIA McCAIN LAMPKIN-ASAM,

Petitioner,

vs.

VOLUSIA COUNTY SCHOOL BOARD, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF MICHAEL A. GEBEL, M.D. TO THE PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Did the Eleventh Circuit Court of Appeals err in affirming the decision of the United States District Court for the Middle District of Florida, Orlando Division, to dismiss the Petitioner's Second Amended Complaint with prejudice for failure to state a claim for which relief could be granted?

INTERESTED PARTIES

The Respondent hereby discloses the following individuals and corporate entities that have an interest in the outcome of this Petition:

Judy Anderson

Honorable David A. Baker, U.S. Magistrate Judge

Sam Boone, CEO, USIS

Brown & Brown, Inc.

Cobb and Cole, P.A.

Mark Corruthers

CorVel Healthcare Corporation

Michael R. D'Lugo, Esquire

Suzanne Evans, RN

Florida Medical Malpractice Joint Underwriting Association (FMMJUA)

Richards H. Ford, Esquire

Michael A. Gebel, M.D.

Karina P. Gonzalez, Esquire

Bruce Hanna, Esquire

Bruce R. Hoffen, M.D.

Charles D. Hood, Jr., Esquire

Katherine Hurst, Esquire

INTERESTED PARTIES – Continued

Julia McCain Lampkin-Asam, Ph.D., J.D.

Sheryl L. Loesch

David E. Mallen, Esquire

Honorable Gregory A. Presnell, U.S. District Judge

Geoffrey D. Ringer, Esquire

Ringer, Henry, Buckley & Seacord, P.A.

Honorable Thomas W. Sculco, Judge Compensation Claims, State of Florida

Division of Administrative Hearings, Orlando District Office

Margaret A. Smith

Smith, Hood, Perkins, Loucks, Stout, Bigman, Lane, and Brock, P.A.

G. Alan Stagmeier, Esquire

USIS, United Self-Insured Services

Volusia County School Board

D. Patricia Wallace, Esquire

Tamara Wenzel, Esquire

Kenneth E. White, Esquire

Wicker, Smith, O'Hara, McCoy & Ford, P.A.

Dr. Al Williams

Steven M. Ziegler, P.A.

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OPINIONS BELOW

Neither the opinion of the United States District Court for the Middle District of Florida nor the opinion of the Eleventh Circuit Court of Appeals was published. Therefore, there is no official citation for either of these opinions. Both opinions have been accurately reproduced in the Appendix to the Petitioners' Petition for Writ of *Certiorari*.

STATEMENT OF THE BASIS OF JURISDICTION

The Petitioner invoked the subject matter jurisdiction of the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1331.

The Eleventh Circuit Court of Appeals had jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

The United States Supreme Court's jurisdiction has been invoked pursuant to 28 U.S.C. § 1254(1).

The opinion of the Eleventh Circuit Court of Appeals was issued on January 8, 2008. The Petition for Writ of *Certiorari* was served on April 5, 2008.

STATEMENT OF THE CASE AND OF THE FACTS

The instant Petition is an effort by Dr. Lampkin-Asam to seek further appellate review of the Circuit Court's affirmance of the District Court's dismissal of her Second Amended Complaint with prejudice. She filed her original Complaint against Dr. Gebel and the remaining Defendants on January 24, 2007. The parties moved to dismiss Dr. Lampkin-Asam's original Complaint, including Dr. Gebel's Motion to Dismiss which was entered on February 20, 2007.

The District Court issued an Order Granting the Parties' Motion to Dismiss on March 1, 2007. This Order Dismissing the original Complaint was without prejudice, and gave Dr. Lampkin-Asam twenty (20) days in which to submit an Amended Complaint.

Dr. Lampkin-Asam filed her Amended Complaint on March 19, 2007. This Amended Complaint named the same Defendants as were named in the original Complaint. Dr. Gebel moved to dismiss the Amended Complaint on March 28, 2007.

The District Court entered an Order Dismissing Dr. Lampkin-Asam's First Amended Complaint on April 16, 2007. In this order, the District Court denied all pending Motions to Dismiss as moot. The District Court gave Dr. Lampkin-Asam twenty (20) days in which to file a Second Amended Complaint. The District Court's order made clear that the Second Amended Complaint would be Dr. Lampkin-Asam's last opportunity to attempt to state a cause of action.

In addition, the April 16, 2007 order provided that the Defendants did not have to respond to the Second Amended Complaint until ordered to do so by the District Court.

Dr. Lampkin-Asam filed her Second Amended Complaint on May 3, 2007. The District Court issued its Order Dismissing the Second Amended Complaint with prejudice on May 31, 2007. Dr. Lampkin-Asam sought appellate review at the Eleventh Circuit Court of Appeal. The Eleventh Circuit affirmed the District Court's dismissal of the Second Amended Complaint in an unpublished opinion dated January 9, 2008. Dr. Lampkin-Asam served her Petition for Writ of *Certiorari* with this Court on April 5, 2008.

The underlying lawsuit is a claim based on various legal theories against numerous Defendants that Dr. Lampkin-Asam filed on her own behalf as a *pro se* Plaintiff. Although she is proceeding *pro se*, at one point in time she was a licensed attorney in the state of Alabama, until she was disbarred. This fact is noteworthy in the instant matter because of the contents of the pleadings Dr. Lampkin-Asam filed with the District Court, and the District Court's very plain and direct warnings to Dr. Lampkin-Asam which she did not heed.

The allegations of the initial Complaint are that Dr. Lampkin-Asam was working as a substitute teacher in Volusia County, Florida. While performing in her capacity as a teac. er, she was assaulted by a student, allegedly resulting in injuries to her head.

As part of her treatment associated with the injuries that she alleges were suffered during this assault, Dr. Lampkin-Asam presented to Michael Gebel, M.D., a Central Florida neurologist.

The allegations of Dr. Lampkin-Asam's Complaint against Dr. Gebel are that after he had performed his evaluation of her, he allegedly changed a medical record. Specifically, Dr. Lampkin-Asam asserts that Dr. Gebel changed a medical record that had originally indicated a 55% disability to a 0% disability, and that this change was made without Dr. Gebel having performed a subsequent physical examination of her. Dr. Lampkin-Asam goes on to assert in both the First Amended Complaint and the Second Amended Complaint that Dr. Gebel, a private neurologist, was a state actor for purposes of stating a cause of action under 42 U.S.C. § 1983.

Dr. Gebel moved to dismiss Dr. Lampkin-Asam's original Complaint on the basis that it failed to state a cause of action for relief under § 1983 because Dr. Gebel is not a state actor. The remaining co-Defendants also filed Motions to Dismiss based upon Dr. Lampkin-Asam's failure to state a cause of action for which relief could be granted.

The District Court dismissed Dr. Lampkin-Asam's initial Complaint without prejudice on March 1, 2007. In the order, the District Court described the Complaint as "disjointed, repetitive, disorganized and barely comprehensible." The District Court noted in the body of the order that Dr. Lampkin-Asam has

both a juris doctor and doctorate of philosophy degree, and that she had previously practiced law in Alabama. The District Court noted that federal courts typically grant greater latitude to the pleadings of *pro se* plaintiffs, but that the Complaint in this case was "unacceptable by any standard, and particularly from a former attorney." The District Court then went on to attempt to steer Dr. Lampkin-Asam in the right direction with regard to the contents of her pleadings.

This admonition went unheeded, and Dr. Lampkin-Asam filed her Amended Complaint on March 19, 2007. This document suffered from the same flaws as the original Complaint. The First Amended Complaint also contained the same allegations against Dr. Gebel, namely that he inappropriately changed the disability percentage on a medical record which impacted Dr. Lampkin-Asam's ability to collect workers' compensation benefits, and further that Dr. Gebel was a state actor for the purposes of filing a claim under 42 U.S.C. § 1983. Dr. Gebel responded with a Motion to Dismiss which was filed on March 28, 2007. This Motion to Dismiss paralleled the argument contained within the original Motion to Dismiss, namely that Dr. Lampkin-Asam had failed to state a cause of action for which relief could be granted, and therefore the Amended Complaint should be dismissed.

The District Court then issued an order *sua sponte* on April 16, 2007 which had the effect of dismissing the Amended Complaint. The District Court revisited the language of the original order, and

then commented that in the Amended Complaint, the "writing remains disjointed, repetitive, disorganized and barely comprehensible." The District Court concluded that the Amended Complaint, "remains an unacceptable shotgun pleading." *Citing* ***Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corporation***, 305 F.3d 1293, 1295 n.10 (11th Cir. 2002). As a result, the District Court dismissed the Amended Complaint without prejudice, and denied all pending Motions to Dismiss as moot. The District Court gave Dr. Lampkin-Asam, "one final chance to draft an amended complaint that satisfies the requirements of the Federal Rules of Civil Procedure." In addition, the District Court ruled that the Defendants would not have to respond to the pleading or any motion filed in the interim until directed to do so by the court.

Dr. Lampkin-Asam filed her Second Amended Complaint on May 3, 2007. The Second Amended Complaint is no different in its substance or in its style from its two predecessors. The allegations as to Dr. Gebel remain the same: namely that he improperly altered medical records which impacted Dr. Lampkin-Asam's ability to collect workers' compensation benefits, and that Dr. Gebel was acting in his capacity as a state actor, thereby triggering the District Court's jurisdiction pursuant to 42 U.S.C. § 1983. Given the District Court's ruling on April 16, 2007, Dr. Gebel did not file a Motion to Dismiss the Second Amended Complaint, although the Second

Amended Complaint suffered from the same deficiencies as the two earlier Complaints.

The District Court issued its Final Order Dismissing the Second Amended Complaint with prejudice on May 31, 2007. The District Court reviewed the procedural history of this case, then began an analysis of shotgun pleadings, which were defined as those pleadings "that incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense." ***Wagner v. First Horizon Pharmaceutical Corp.***, 464 F.3d 1273, 1279 (11th Cir. 2006). The District Court stated that Dr. Lampkin-Asam ignored repeated admonitions from the court regarding the contents of her pleadings. In concluding its Final Order of Dismissal, the District Court stated:

> Asam was warned that this was her final opportunity to draft an acceptable complaint. In consideration of the foregoing, it is hereby ordered and adjudged that the Second Amended Complaint (document 83) is dismissed with prejudice. All pending motions are denied as moot, and the clerk is directed to close this case.

The Circuit Court affirmed the District Court in all respects. The briefs that Dr. Lampkin-Asam filed with the Eleventh Circuit, as is the case with the Petition filed in this Court, suffer from the same infirmities that undermined her filings with the District Court. There is no coherence to any of the filings, which reflect a complete failure to state a

cause of action against Dr. Gebel (or any other defendant) at the District Court level, and the absence of any reasonable argument to support a reversal at the Circuit Court, or to support the issuance of a Writ of *Certiorari* here. In the absence of any coherent argument to support her contentions, Dr. Lampkin-Asam's Petition for Writ of *Certiorari* should be denied.

SUMMARY OF THE ARGUMENT

Dr. Lampkin-Asam filed an original Complaint that failed to state a cause of action for which relief could be granted against Dr. Gebel. Moreover, the initial Complaint constituted a shotgun pleading that was so incoherent as to border on being incomprehensible. The District Court recognized this, and dismissed the original Complaint without prejudice, giving Dr. Lampkin-Asam an opportunity to correct her mistakes.

On two separate occasions, Dr. Lampkin-Asam simply refused to do so. Instead, both the First Amended Complaint and the Second Amended Complaint suffered from the same deficiencies as the original Complaint. Dr. Lampkin-Asam refused to heed the warnings contained within the orders issued by the District Court. She was given ample opportunity to correct these mistakes, and repeatedly failed to do so. The District Court's patience appropriately wore out with Dr. Lampkin-Asam's third failed

attempt at filing a pleading that met with the requirements of the Federal Rules of Civil Procedure. As such, the District Court properly dismissed Dr. Lampkin-Asam's Second Amended Complaint with prejudice. The Eleventh Circuit Court of Appeals reviewed the Complaints submitted to the District Court, and agreed that the Complaints all failed to state a cause of action for which relief could be granted. Dr. Lampkin-Asam has failed to articulate any basis to support further review, and therefore her Petition for Writ of *Certiorari* should be denied.

ARGUMENT

THE DISTRICT COURT PROPERLY DISMISSED DR. LAMPKIN-ASAM'S SECOND AMENDED COMPLAINT WITH PREJUDICE, AS SHE HAD REPEATED OPPORTUNITIES TO AMEND HER PLEADING, BUT SHE STEADFASTLY REFUSED TO HEED THE WARNINGS OF THE DISTRICT COURT TO FOLLOW THE FEDERAL RULES OF CIVIL PROCEDURE.

The instant Petition is an effort by Dr. Lampkin-Asam to have this Court review the affirmance issued by the Eleventh Circuit of the order of the District Court which had the effect of dismissing Dr. Lampkin-Asam's Second Amended Complaint with prejudice. There is no basis contained within the Petition that would support the issuance of a writ as Dr. Lampkin-Asam requests. The record reveals that

Dr. Lampkin-Asam filed what can at best be described as an unwieldy original Complaint, with confusing allegations spread across a broad spectrum of Defendants, without any cohesion or clarity to the written allegations. The District Court recognized this in the order dismissing the original Complaint without prejudice, and in fact provided Dr. Lampkin-Asam with guideposts to assist her in drafting an appropriate pleading. Unfortunately, Dr. Lampkin-Asam refused to follow the guidance that was provided in the District Court's order.

Dr. Lampkin-Asam's First Amended Complaint was similar to the original Complaint in its lack of organization. Dr. Gebel moved to dismiss both the original Complaint and the First Amended Complaint for the failure to state a cause of action for which relief could be granted. Indeed, there is no way to assert a federal claim for violation of 42 U.S.C. § 1983 against Dr. Gebel, a private physician. However, the District Court never reached this issue, instead concluding that Dr. Lampkin-Asam's First Amended Complaint suffered from the same deficiencies as the original Complaint. Therefore, the District Court dismissed the First Amended Complaint once again, and gave Dr. Lampkin-Asam one final opportunity to comply with the Federal Rules of Civil Procedure.

This Dr. Lampkin-Asam steadfastly refused to do. Instead, she filed a Second Amended Complaint that is just as incomprehensible as the first two versions of her lawsuit. Dr. Lampkin-Asam refused to accept any of the suggestions contained within

the District Court's previous two orders. Instead, Dr. Lampkin-Asam raised the same incoherent charges against the various Defendants. The District Court properly recognized this Second Amended Complaint as being deficient for the same reasons that the original two Complaints had been deficient. The District Court gave Dr. Lampkin-Asam ample opportunity to correct the deficiencies within her original pleadings, and she simply refused to do so.

There is nothing contained within Dr. Lampkin-Asam's Petition for Writ of *Certiorari* that compels any conclusion other than the Petition should be denied. In fact, the Petition filed with this Court closely resembles the Complaints that were ultimately rejected at the District Court level. The allegations against the various Appellees are haphazard, incoherent, and likewise fail to state a cause of action for which relief can be granted. There was no allegation in any of the complaints filed with the District Court that raised a colorable argument to support a cause of action against Dr. Gebel. There was likewise nothing within the Petition to support the issuance of a writ in this case. In the absence of any coherent argument to support a reversal of the District Court's dismissal of the Second Amended Complaint with prejudice, the District Court's order must be allowed to stand, and this Court should deny Dr. Lampkin-Asam's Petition for Writ of *Certiorari*.

CONCLUSION

For the reasons stated herein, the Respondents respectfully request that this Court deny Dr. Lampkin-Asam's Petition for Writ of *Certiorari*, and affirm the District Court and the Circuit Court in all respects.

Respectfully submitted,

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